Supreme Court, U.S.
FILED
NOV 8 1993
OFFICE OF THE CLERK

No. 93-491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CROSTHWAIT EQUIPMENT COMPANY, INC., A. CURTIS CROSTHWAIT, JR., ALLEN E. CROSTHWAIT AND RUTH A. CROSTHWAIT,

Petitioners,

v.

JOHN DEERE COMPANY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DOW N. KIRKPATRICK, II
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000

Counsel for Respondent

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether this Court should exercise its discretion to grant certiorari to review whether the Courts of Appeals of the various circuits substantively differ in their application of Fed. R. Civ. P. 50(a)(1) when each of the Courts of Appeals apply the proper standard and reach similar results even though they use slightly different terminology in articulating the standard to be applied when considering motions for judgment as a matter of law.

2. Whether this Court should exercise its discretion to grant certiorari to review whether the granting of a Fed. R. Civ. P. 50(a)(1) motion for judgment as a matter of law violates a party's Seventh Amendment right to trial by jury where the district court considers all the evidence in the light most favorable to the non-moving party.

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Crosthwait Equipment Company, Inc., Plaintiff-Appellant, Cross-Appellee

2. A. Curtis Crosthwait, Jr., Plaintiff-Appellant, Cross-Appellee

3. Allen E. Crosthwait, Plaintiff-Appellant

4. Ruth A. Crosthwait, Plaintiff-Appellant, Cross-Appellee

5. John Deere Company, Defendant-Appellee, Cross-Appellant, a wholly owned subsidiary of Deere & Company

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
REASONS FOR DENYING THE WRIT OF CERTIORARI	4
I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI BECAUSE THERE EXISTS NO SPLIT IN THE CIRCUITS WITH RESPECT TO THE APPLICATION OF FED. R. CIV. P. 50(a)(1)	4
II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI BECAUSE THERE EXISTS NO VIOLATION OF PETITIONERS' SEVENTH AMENDMENT RIGHTS	10
III. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI BECAUSE THE ANY EVIDENCE STANDARD PROPOSED BY PETITIONERS IS ANALOGOUS TO THE SCINTILLA RULE REJECTED BY THIS COURT	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	Page
Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901 (9th Cir.), *cert. denied*, 436 U.S. 946 (1978)	10
Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969)	6, 7, 9, 10, 11
Brady v. Southern Ry., 320 U.S. 476 (1943)	12
Casko v. Elgin, J. & E. Ry., 361 F.2d 748 (7th Cir. 1966)	6, 7
Caudill v. Farmland Indus., Inc., 919 F.2d 83 (8th Cir. 1990)	9
Conaway v. Control Data Corp., 955 F.2d 358 (5th Cir.), *cert denied*, 113 S. Ct. 186 (1992)	6
Crosthwait Equipment Co., Inc. v. John Deere Co., 992 F.2d 525 (5th Cir. 1993)	1, 2, 3
Dace v. ACF Indus., Inc., 722 F.2d 374 (8th Cir. 1983), *adhered to as supplemented*, 728 F.2d 976 (8th Cir. 1984)	9
Galloway v. United States, 319 U.S. 372 (1943)	10, 11
General Motors Acceptance Corp. v. Bates, 954 F.2d 1081 (5th Cir. 1992)	6
J.E.K. Indus., Inc. v. Shoemaker, 763 F.2d 348 (8th Cir. 1985)	10
Kingston v. McGrath, 232 F.2d 495 (9th Cir. 1956)	7

CASES	Page
La Montagne v. American Convenience Prods., Inc., 750 F.2d 1405 (7th Cir. 1984)...	10
Lyons v. J. C. Penney Co., 316 F.2d 753 (7th Cir. 1963)	9
Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967)	11
Pennsylvania R.R. v. Chamberlain, 288 U.S. 333 (1933)	11, 12
Runnings v. Ford Motor Co., 461 F.2d 1145 (9th Cir. 1972)	7
Schwimmer v. Sony Corp. of Am., 459 U.S. 1007 (1982)	6
Simpson v. Skelly Oil Co., 371 F.2d 563 (8th Cir. 1967)	8, 9
United Cal. Bank v. THC Fin. Corp., 557 F.2d 1351 (9th Cir. 1977)	10
Wilkerson v. McCarthy, 336 U.S. 53 (1949)	7
Yarbrough v. Tower Oldsmobile, Inc., *789 F.2d 508 (7th Cir. 1986)*	*10*
STATUTE	
Federal Employers' Liability Act, 45 U.S.C. §§ 51-60. ...	6, 7, 12
RULES	
Fed. R. Civ. P. 50(a)(1)	2, 3, 4, 5, 6, 7, 8, 9, 10, 11
Fed. R. Civ. P. 50 (1987)	5

CONSTITUTION	Page
U. S. Const. amend. VII	4, 6, 10, 11

OTHER	
Advisory Committee's Note to Fed. R. Civ. P. 50	5, 6, 8, 11
Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903 (1971)	8

No. 93-491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CROSTHWAIT EQUIPMENT COMPANY, INC., A. CURTIS CROSTHWAIT, JR., ALLEN E. CROSTHWAIT AND RUTH A. CROSTHWAIT,

Petitioners,

v.

JOHN DEERE COMPANY,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

A comprehensive and accurate statement of the facts and prior proceedings in this case is set forth in the Fifth Circuit's opinion reported at 992 F.2d 525 (5th Cir. 1993).

Petitioner, Crosthwait Equipment Company, Inc., formerly an authorized Deere dealership in Mississippi,[1] brought this action in a Mississippi state court alleging that respondent had wrongfully terminated the farm equipment dealership. The case

[1] Crosthwait Equipment Company, Inc. was owned and operated by A. Curtis Crosthwait, Ruth A. Crosthwait, and Allen E. Crosthwait (collectively "petitioners").

(footnote continues)

was removed to the United States District Court for the Northern District of Mississippi. Respondent presented uncontroverted evidence at trial which established that the dealership was terminated pursuant to the terms of the dealership agreement because petitioners submitted fraudulent sales and credit documents to respondent. Specifically, respondent produced twenty-one of petitioners' former customers who testified without contradiction that documents submitted to respondent by petitioner contained falsifications and misleading information regarding various aspects of transactions involving petitioners and their customers. The false and misleading information included inflated down payments, incorrect purchase price information and fictitious equipment listed as trade-ins. 992 F.2d at 527. Moreover, uncontroverted evidence established that the serial numbers on equipment had been altered by petitioners. *Id.* Petitioner Allen Crosthwait even acknowledged that falsified sales and credit documents had been submitted to respondent. *Id.* Notwithstanding the uncontroverted evidence, however, petitioners argued that respondent wrongfully terminated the dealership and that the reason for termination went beyond the terms of the dealership agreement. *Id.*

The jury returned a verdict in favor of petitioners. The district court subsequently granted respondent's motion for judgment as a matter of law.[2] Fed. R. Civ. P. 50(a)(1).

(footnote continued)

Petitioners refer to themselves as "franchisees of the John Deere Company." The Fifth Circuit did not find that a franchisee/franchisor relationship existed between petitioners and respondent and respondent disputes that such a relationship existed between the parties. This Court need not characterize the relationship. It is sufficient for purposes of this Court's considerations that the relationship is governed by contract, specifically the dealership agreement between the parties.

[2] Respondent counterclaimed for the unpaid balance due on an account after termination of the dealership. This issue is irrelevant for purposes of this petition and will be referred to only incidentally. The district court denied resondent's motion for judgment as a matter of law or new trial on respondent's counterclaim.

The Fifth Circuit affirmed the district court utilizing the same standard as the district court in determining whether to uphold the granting of respondent's motion for judgment as a matter of law. The Fifth Circuit stated, "[t]he record below provides overwhelming evidence that the sales and credit documents prepared by Crosthwait on its customers' behalf for submission to Deere contained false information which the customers did not supply or create, which were deliberate and material and upon which Deere detrimentally relied." 992 F.2d at 528. The Fifth Circuit concluded, as had the district court, that notwithstanding the jury verdict for petitioners, a motion for judgment as a matter of law must be granted when the evidence, with all reasonable inferences considered in the light most favorable to petitioners, pointed "so strongly and overwhelmingly in favor of [respondent] that . . . reasonable jurors could not arrive at a contrary verdict. *Id.*

Accordingly, the district court's judgment as a matter of law under the standard enumerated was appropriate and consistent with Fed. R. Civ. P. 50(a)(1).[3] The Fifth Circuit denied a petition for rehearing without opinion.

SUMMARY OF THE ARGUMENT

The Supreme Court grants writs of certiorari in cases of great importance which involve conflicts between the circuits or some significant issue with respect to the Constitution or the laws of the United States. None of these factors are present in this case. Although petitioners claim Fed. R. Civ. P. 50(a)(1) is being inconsistently applied in the various circuits, petitioners' argument is based solely on semantics. The utilization of different terminology to articulate the standard set forth in Fed. R. Civ. P. 50(a)(1) does not create a split between the circuits. Moreover, contrary to petitioners' argument, the granting of a Fed R. Civ. P. 50(a)(1) motion for judgment as a matter of law does not violate

---

[3] As to respondent's counterclaim, the Fifth Circuit reversed the district court's denial of respondent's motion for judgment as a matter of law and remanded the case for retrial of the issues raised by the counterclaim.

petitioners' Seventh Amendment rights. Finally, an "any evidence" standard has never been used in determining whether to grant a Fed. R. Civ. P. 50(a)(1) motion for judgment as a matter of law. Rather, the evidence has always been viewed in the light most favorable to the nonmoving party prior to any determination as to whether there is a legally sufficient evidentiary basis for a jury to have found for the nonmoving party. A mere scintilla of evidence in favor of the nonmoving party has never been enough to sustain a verdict against a Fed. R. Civ. P. 50(a)(1) motion.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI BECAUSE THERE EXISTS NO SPLIT IN THE CIRCUITS WITH RESPECT TO THE APPLICATION OF FED. R. CIV. P. 50(a)(1)

Decisions of the Courts of Appeals are in conflict only when one circuit, when presented with the same facts and evidence and applying the same law, would decide the case differently from another circuit. Petitioners argue that a conflict exists among the circuits in determining whether to grant a motion for judgment as a matter of law under Fed. R. Civ. P. 50(a)(1). Petitioners argue that because the various circuits rely on different terminology to articulate the applicable standard, outcomes may be inconsistent. Fed. R. Civ. P. 50(a)(1), and the case law and commentary which address it, reveal that no conflict exists between the circuits with respect to the application of the standard governing motions for judgment as a matter of law.

In 1991, Fed. R. Civ. P. 50(a)(1) was amended.[4] Had this Court felt a long-standing split existed between the circuits with

---

[4] Fed. R. Civ. P. 50(a)(1) now states, "If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with

(footnote continues)

regard to the standard for granting motions for judgment as a matter of law, the preferred standard could have been articulated when this Court adopted the 1991 amendment. As noted by the Advisory Committee, however, the amended rule "articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard. That existing standard was not expressed in the former rule, but was articulated in long-standing case law." Fed. R. Civ. P. 50 Advisory Committee's Note.

The applicable standard under Fed. R. Civ. P. 50(a)(1), approved by this Court, requires a finding of "no legally sufficient evidentiary basis" in order for a court to grant a motion for judgment as a matter of law. The standard is the same for all circuits. While the various circuits may use various terms to characterize their application of the uniform standard, it does not follow that the circuits are applying a conflicting standard. By not making the criteria applicable in Fed. R. Civ. P. 50(a)(1) more explicit in 1991, the Court accepted the application of the standard found in the preexisitng case law of the various circuits. This Court has a particularly strong interest in having the standard applied appropriately and consistently by the various circuits

---

(footnote continued)

respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, crossclaim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue."

Prior to the 1991 amendment, Fed. R. Civ. P. 50 (1987) stated, "(b) Motion for Judgment Notwithstanding the Verdict. . . . Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. . . . If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

because of Seventh Amendment considerations. Both the wording of Fed. R. Civ. P. 50(a)(1) and the Advisory Committee's Notes reaffirm this Court's approval of the previous applications of the standard by the various circuits.

The only Supreme Court authority relied upon by petitioners to substantiate a split between the circuits is Justice White's dissent in *Schwimmer v. Sony Corp. of Am.*, 459 U.S. 1007 (1982). Not only did the Court deny the writ of certiorari in *Schwimmer* in 1982, but the Court has not subsequently adopted the views expressed in Justice White's dissent, as demonstrated by the fact that the Court did not articulate a more specific standard at the time of the 1991 amendment to Fed. R. Civ. P. 50(a)(1). There is no reason for this Court to reconsider its earlier decisions and actions respecting Fed. R. Civ. P. 50(a)(1).

The standard used by the district court and Fifth Circuit in this case was initially articulated in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) as follows: "On motions for . . . judgment notwithstanding the verdict [now called motion for judgment as a matter of law in Fed. R. Civ. P. 50(a)(1)] the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Id.* at 374. The expression of the standard as applied in *Boeing* has consistently been cited in the Fifth Circuit. *See Conaway v. Control Data Corp.*, 955 F.2d 358 (5th Cir.), *cert. denied*, 113 S. Ct. 186 (1992); *General Motors Acceptance Corp. v. Bates*, 954 F.2d 1081 (5th Cir. 1992).

Petitioners rely on certain decisions from the Seventh, Eighth, and Ninth Circuits in an effort to create a split between the circuits. A review of the authorities relied upon by petitioners, however, indicates the Seventh, Eighth, and Ninth Circuits utilize the same standard applied in *Boeing*.

Two of the cases cited by petitioners address the issue in terms of actions brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (hereinafter "FELA"): *Casko v. Elgin, J. &*

E. Ry., 361 F.2d 748 (7th Cir. 1966) and *Kingston v. McGrath*, 232 F.2d 495 (9th Cir. 1956). In *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), this Court enunciated a standard applicable in FELA cases which, on its face, seems to differ with *Boeing* in that only the non-moving party's evidence is to be considered in FELA cases. *Boeing*, however, distinguished FELA and non-FELA cases.

> The Court should consider *all* of the evidence and not just that evidence which supports the non-mover's case. The Supreme Court in *Wilkerson v. McCarthy*, an FELA case, held that all the evidence should not be considered in a motion for a directed verdict [or a motion for judgment as a matter of law]. However, the Courts of Appeals have tended to reach the conclusion that all the evidence should be considered, 'distinguishing *Wilkerson* on the ground that FELA cases are sui generis.' . . . The evidence must be considered in the light and with all reasonable inferences most favorable to the party opposed to the motion.

411 F.2d at 375 n.16 (quoting 5 James W. Moore et al., *Moore's Federal Practice*, paragraph 50.02[1] (2d ed. 1968)) (citation omitted).[5]

---

[5] *See generally Boeing*, 411 F.2d at 375 n.16 for cases agreeing with this distinction. In *Runnings v. Ford Motor Co.*, 461 F.2d 1145 (9th Cir. 1972), the Ninth Circuit stated, "On such a motion [under former Fed. R. Civ. P. 50(a)] the question before the trial court is whether the evidence *in its entirety* would rationally support a verdict for the plaintiff [non-moving party], assuming the jury took a view of the evidence most favorable to plaintiff." *Id.* at 1147 (emphasis added). This lends further support to a distinct difference in FELA, non-FELA standards for granting Fed. R. Civ. P. 50(a)(1) motions since the Ninth Circuit applied the *Wilkerson* standard in *Kingston*, 232 F.2d 495 (9th Cir. 1956), a case cited by petitioner.

Moreover, even the application of *Wilkerson* in the context of FELA cases has been criticized.

(footnote continues)

Commentators have uniformly criticized any standard which confines consideration to only those portions of the record which favor the non-moving party. Professor Edward H. Cooper has commented,

> it seems clear that it would be absurd to apply literally a rule requiring consideration of only the parts of the evidence favorable to the party opposing a directed verdict motion, that most courts have recognized the logic of considering parts of the evidence unfavorable to that party, and that nothing in *Wilkerson* require[s] a different approach.

Cooper at 952.[6]

Other cases cited by petitioners fail to establish a split in the circuits over this issue. In *Simpson v. Skelly Oil Co.*, 371 F.2d 563 (8th Cir. 1967), the Eighth Circuit stated that when presented with a motion for judgment as a matter of law,

---

(footnote continued)

> The most important reason for disregarding the literal sweep of the Court's statement in *Wilkerson* is that the Court [in *Wilkerson*] was not faced with any unfavorable evidence of a sort which the jury should be compelled to believe. . . . The Court's statement that consideration should be given only to the favorable evidence is thus an accurate response to the needs of the case before it, and it need not mean that the same approach is appropriate when there is unfavorable evidence which a jury should not be allowed to ignore.

Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 948-949 (1971).

[6] The authoritativeness of Professor Cooper's interpretation is reflected by the Advisory Committee's Note to the 1991 amendment of Fed. R. Civ. P. 50(a)(1) where the Committee cites Professor Cooper's article after stating that, "the standard for granting a motion for judgment as a matter of law .... was not expressed in the former rule, but was articulated in long-standing case law."

> it is [the judge's] duty to accept the plaintiff's version as true for the purposes of the motion, notwithstanding the existence of strong testimony to the contrary; the judge is not concerned with the weight of the evidence.... The standard ... is whether plaintiff's evidence is sufficient to support a burden, ignoring defendant's evidence.

Id. at 567. This, in essence, says the same thing as *Boeing*, except that different terminology is used by the Eighth Circuit. Although *Boeing* says a district court presented with a Fed. R. Civ. P. 50(a)(1) motion must refer to "all evidence," the caveat is added that all evidence is considered only to the extent that it supports the non-moving party.[7]

Petitioners also rely on *Lyons v. J.C. Penney Co.*, 316 F.2d 753 (7th Cir. 1963) where the Seventh Circuit stated, "[w]e consider ... only the evidence favorable to plaintiff [the non-moving party in this instance] and draw the inferences most strongly in her favor." *Id.* at 753. Again, there is no conflict with *Boeing* and the Fifth Circuit.

Similarly, in *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83 (8th Cir. 1990), relied upon by petitioners, the Eighth Circuit stated that, "only evidence favoring the non-moving party should be considered." *Id.* at 86. This is consistent with *Boeing*'s statement and application of the Fed. R. Civ. P. 50(a)(1) standard. In further support of the accord between the circuits, the Eighth Circuit cited *Dace v. ACF Indus., Inc.*, 722 F.2d 374 (8th Cir. 1983), *adhered to as supplemented*, 728 F.2d 976 (8th Cir. 1984) for the proposition that the movant's evidence which "is completely disinterested, uncontradicted, and unimpeached" may be considered by the court in making its determination. *Id.* at 377 n.6. *Boeing* endorses the same concept by permitting the district court to

---

[7] "[I]n the light and with all reasonable inferences *most favorable to the party opposed to the motion.*" *Boeing*, 411 F.2d at 374 (emphasis added).

consider all the evidence, but only in the light most favorable to the non-moving party.

Moreover, even in circuits where petitioners claim the standard differs from *Boeing* there are decisions that cite *Boeing* as articulating the proper application of Fed. R. Civ. P. 50(a)(1). *See Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 513 (7th Cir. 1986); *J.E.K. Indus., Inc. v. Shoemaker*, 763 F.2d 348, 353 (8th Cir. 1985); *LaMontagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984); *Autohaus Brugger, Inc., v. Saab Motors, Inc.*, 567 F.2d 901, 909 (9th Cir.), *cert. denied*, 436 U.S. 946 (1978); *United Cal. Bank v. THC Fin. Corp.*, 557 F.2d 1351, 1356 (9th Cir. 1977).

In sum, while *Boeing* permits all of the evidence to be considered, it qualifies the statement by requiring that all reasonable inferences be drawn in favor of the non-moving party and that the evidence be viewed only in the light most favorable to the non-moving party. Whether the standard is articulated as a review of all of the evidence in the light most favorable to the non-moving party or as a review of only the evidence favorable to the non-moving party, the result is the same — the non-moving party gets every benefit of the doubt. The position advanced on behalf of petitioners constitutes nothing more than a distinction without a difference. There is no split between the circuits with respect to Fed. R. Civ. P. 50(a)(1). The standards used in the Seventh, Eighth, and Ninth Circuits do not conflict with *Boeing* and the Fifth Circuit.

II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI BECAUSE THERE EXISTS NO VIOLATION OF PETITIONERS' SEVENTH AMENDMENT RIGHTS

The granting of a Fed. R. Civ. P. 50(a)(1) motion for judgment as a matter of law does not violate petitioners' Seventh Amendment rights. *Galloway v. United States*, 319 U.S. 372 (1943). Granting a motion for judgment as a matter of law using the

standard enunciated in Fed. R. Civ. P. 50(a)(1), "is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment ...." Fed. R. Civ. P. 50 Advisory Committee's Note. As this Court has stated on several occasions, "it is settled that Rule 50(b) [now Fed. R. Civ. P. 50(a)(1)] does not violate the Seventh Amendment's guarantee of a jury trial." *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1967) (citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940)). *See also Galloway*, 319 U.S. 372 (1943).

Petitioners argue that the Fifth Circuit denied their Seventh Amendment right to jury trial by using the standard in *Boeing*, but they do not make a similar argument with regard to the criteria used in the Seventh, Eighth, and Ninth Circuits. As previously discussed, however, the operative standard is the same in all the circuits. Petitioners are merely upset at the application of the standard to the facts of their case. Nevertheless, the same result would have been reached in any other circuit, and there has been no violation of petitioners' Seventh Amendment rights.

III. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI BECAUSE THE ANY EVIDENCE STANDARD PROPOSED BY PETITIONERS IS ANALOGOUS TO THE SCINTILLA RULE REJECTED BY THIS COURT

Petitioners propose a criteria with respect to Fed. R. Civ. P. 50(a)(1) motions that would preclude granting the motion if there is any evidence that supports the verdict. Such a standard, however, constitutes nothing more than a restatement of the "scintilla rule." In fact, petitioners utilize the word "scintilla" in formulating their proposed standard. The scintilla rule has long been rejected in federal courts.

> The rule is settled for the federal courts ... that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the

> judge to direct the jury to find according to the views of the court.... The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned.

Pennsylvania R.R. v. Chamberlain, 288 U.S. 333, 343 (1933). *See also Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943) (rejecting the scintilla rule even in FELA cases).

CONCLUSION

For the foregoing reasons, John Deere Company respectfully urges that the petition for a writ of certiorari be denied

Respectfully submitted this 8th day of November, 1993.

DOW N. KIRKPATRICK, II
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 881-7000

Counsel for Respondent